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CHARLES ELMORE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 687

DAVID FRANKLIN,

Appellant,

vs.

J. WALKER HARPER, C. NOLAN BOWDEN AND G. E. MURPHY,

Appellees

APPEAL FROM THE SUPREME COURT OF THE STATE OF GEORGIA

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

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† J. WALKER HARPER,
Pro Se.

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Corpus Juris, Volume 20, pp. 60, 61 and 64 9

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IN THE SUPREME COURT OF GEORGIA

Case No. 16758

DAVID FRANKLIN,

Appellant,

vs.

J. WALKER HARPER, C. NOLAN BOWDEN AND G. E. MURPHY,

Appellees

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS

Now come the appellees in the above stated matter and file this their statement as to the jurisdiction of the Supreme Court of the United States, their motion to dismiss, and their citation of authorities, within the time prescribed by Law with the Clerk of the Supreme Court of Georgia, and say:

Jurisdictional Statement

The facts of this case are these:

The act of the Legislature of the State of Georgia in question was approved February 25, 1949. Thereafter the procedure set up under said act for the appointment of registrars was complied with, and the appellees were appointed by the Judge of the Superior Court, sworn into office, and on April 1, 1949, began exercising the powers and

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duties required of them as the Board of Registrars. No persons attempted to qualify with the appellees during the month of April, but the organization of the machinery for registration was begun. On April 30, 1949, County warrants for the pay of such registrars were presented to the appellant for his signature, but he refused to authorize the payment. The vouchers for payment were presented to the appellant by virtue of his being the Chairman of the Board of Commissioners of Roads and Revenues of Richmond County, which Commissioners are in charge of the financial affairs of said County. On May 3, 1949, the Board of Commissioners of Roads and Revenues passed a resolution directing the appellant to sign said salary warrants, but thereafter the appellant still refused to sign them when they were presented to the appellant after the passage of this resolution. The appellees filed a petition for a writ of mandamus to require the appellant to sign said salary warrants alleging these facts and further alleging that the appellant was a qualified voter under the new act approved February 25, 1949. The appellant demurred upon several grounds, attacking the constitutionality of the act in question as being repugnant to the Constitution of the State of Georgia and as being repugnant to the Fourteenth and Fifteenth Amendments to the Constitution of the United States. One of the particular grounds of the attack made by the appellant was that once a citizen of the United States had registered as a voter in Georgia, such citizen acquired a vested right to continue to be a registered elector. The appellant avers that "after one becomes a duly qualified voter, he has a property right in that privilege".

The appellant further attacked the statute in question because "it was intended to discriminate against all persons, white and black".

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Argument and Citation of Authorities

THE RIGHT TO VOTE IS A POLITICAL RIGHT THAT IS CONFERRED BY THE LAW-MAKING POWER OF THE STATE AND IS A QUESTION TO BE DECIDED BY THE STATE COURTS. NO FEDERAL QUESTION IS INVOLVED.

"In this condition of the law in respect to suffrage in the several states, it cannot for a moment be doubted that if it had been intended to make all citizens of the United States voters, the framers of the Constitution would not have left it to implication. So important a change in the condition of citizenship as it actually existed, if intended, would have been expressly declared.

"But if further proof is necessary to show that no such change was intended, it can easily be found both in and out of the Constitution. By article 4, section 2, it is provided that 'The citizens of each State shall be entitled to all the privileges and immunities of citizens in the several states.' If suffrage is necessarily a part of citizenship, then the citizens of each State must be entitled to vote in the several States precisely as their citizens are. This is more than asserting that they may change their residence and become citizens of the State and thus become voters. It goes to the extent of insisting that while retaining their original citizenship they may vote in any State. This, we think, has never been claimed. And again, by the very terms of the Amendment we have been considering (the fourteenth), 'Representatives shall be apportioned among the several states according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice-President of the United States, representatives in Congress, the executive and judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of

such State, being twenty-one years of age and citizens of the United States, or in any way abridged, except for participation in the rebellion, or other crimes, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.' Why this, if it was not in the power of the Legislature to deny the right of suffrage to some male inhabitants? And if suffrage was necessarily one of the absolute rights of citizenship, why confine the operation of the limitation to male inhabitants? Women and children are, as we have seen, 'persons.' They are counted in the enumeration upon which the appropriation is to be made, but if they were necessarily voters because of their citizenship unless clearly excluded, why inflict the penalty for the exclusion of males alone? Clearly, no such form of words would have been selected to express the idea here indicated, if suffrage was the absolute right of all citizens.

"As has been seen, all the citizens of the States were not invested with the right of suffrage. In all, save perhaps New Jersey, this right was only bestowed upon men and not upon all of them. Under these circumstances it is certainly now too late to contend that a government is not republican, within the meaning of this guaranty in the Constitution, because women are not made voters.

"Besides this, citizenship has not in all cases been made a condition precedent to the enjoyment of the right of suffrage. Thus, in Missouri, persons of foreign birth, who have declared their intention to become citizens of the United States, may under certain circumstances vote. The same provision is to be found in the Constitutions of Alabama, Arkansas, Florida, Georgia, Indiana, Kansas, Minnesota, and Texas.

"Certainly, if the courts can consider any question settled, this is one. For nearly ninety years the people have

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acted upon the idea that the Constitution, when it conferred citizenship, did not necessarily confer the right of suffrage. If uniform practice, long continued, can settle the construction of so important an instrument as the Constitution of the United States confessedly is, most certainly it has been done here. Our province is to decide what the law is, not to declare what it should be.

"We have given this case the careful consideration its importance demands. If the law is wrong, it ought to be changed; but the power for that is not with us. The arguments addressed to us bearing upon such a view of the subject, may, perhaps, be sufficient to induce those having the power to make the alteration, but they ought not to be permitted to influence our judgment in determining the present rights of the parties now litigating before us. No argument as to woman's need of suffrage can be considered. We can only act upon her rights as they exist. It is not for us to look at the hardship of withholding. Our duty is at an end if we can find it is within the power of a State to withhold.

"Being unanimously of the opinion that the Constitution of the United States does not confer the right of suffrage upon anyone, and that the Constitutions and laws of the several States which commit that important trust to men alone are not necessarily void, we affirm the judgment of the court below." *Virginia L. Minor and Francis Minor, Plffs. in Err.*, v. *Reese Happersett*, 22 S. Ct., Page 627; 21 Wall., 162-178.

"The privilege to vote in any state is not given by the Federal Constitution, or by any of its amendments. It is not a privilege springing from citizenship of the United States. Minor v. Happersett, 21 Wall. 162, 22 L. Ed. 627. It may not be refused on account of race, color, or previous condition of servitude, but it does not follow from mere citizenship of the United States. In other words, the privilege to vote in a state is within the jurisdiction of the state

itself, to be exercised as the state may direct, and upon such terms as to it may seem proper, provided, of course, no discrimination is made between individuals, in violation of the Federal Constitution. The state might provide that persons of foreign birth could vote without being naturalized, and, as stated by Mr. Chief Justice Waite in Minor v. Happersett, 21 Wall. 162, 22 L. ed. 627, such persons were allowed to vote in several of the states upon having declared their intentions to become citizens of the United States. Some states permit women to vote; others refuse them that privilege. A state, so far as the Federal Constitution is concerned, might provide by its own constitution and laws that none but native-born citizens should be permitted to vote, as the Federal Constitution does not confer the right of suffrage upon any one, and the conditions under which that right is to be exercised are matters for the states alone to prescribe, subject to the conditions of the Federal Constitution, already stated; although it may be observed that the right to vote for a member of Congress is not derived exclusively from the state law. See Fed. Const. art. 1, sec. 2; Wiley v. Sinkler, 179 U. S. 58, 45 L. ed. 84, 21 Sup. Ct. Rep. 17. But the elector must be one entitled to vote under the state statute. Id., Id. See also Swafford v. Templeton, 185 U. S. 487, 491, 46 L. ed. 1005, 1007, 22 Sup. Ct. Rep. 783. In this case no question arises as to the right to vote for electors of President and Vice-President, and no decision is made thereon. The question whether the conditions prescribed by the state might be regarded by others as reasonable or unreasonable is not a Federal one." *William H. Pope, Plff. in Err.*, v. *John M. C. Williams, et al.*, 24 S. Ct. Rep., Page 573; 193 U. S. 621.

In *Quinn* v. *United States*, 35 S. Ct. 926, 238 U. S. 347, on page 931, the Court said this:

"No time need be spent on the question of the validity of the literacy test, considered alone, since, as we have seen its

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establishment was but the exercise by the state of a lawful power vested in it, not subject to our supervision, and indeed its validity is admitted. Whether this test is so connected with the other one relating to the citation on January 1, 1866, that the invalidity of the latter requires the rejection of the former, is really a question of State law. . . ."

The right of the State to reasonably regulate the exercise of the elective franchise was recognized in the latest decision of this Court in *Davis* v. *Schnell,* reported in 81 Federal Supplement, 872, and affirmed by a memorandum decision of this Court on March 28, 1949.

We do not think but that the law is well established, that each sovereign state has the power to regulate its elective franchise; and the State of Georgia has passed on this question.

"The right to vote is a political right or privilege, to be given or withheld at the exercise of the law making power of the sovereignty. It is not a natural right of the citizen, but a franchise dependent upon law, by which it must be conferred to permit its exercise. It can emanate only from the people, either in their sovereign statement of the organic law or through legislative enactment which they have authorized. It is not included among the rights of property or of person. Neither is it an absolute unqualified right, but is altogether conventional. When once granted it may be taken away by the exercise of sovereign power, and if taken away no vested right is violated or bill of attainder passed. Decisions referring to the right of suffrage as a vested right are explainable on the ground that they use the word 'vested' in the sense that the right cannot be taken away except by the power which conferred it. Likewise decisions that the right to vote, where once conferred, is a property right of which the holder cannot be deprived

except by due process of law, refer to a deprivation other than by the power which conferred the right."

"Subject to the constitutional restrictions as to race, color, and previous condition of servitude, the states have supreme and exclusive power to regulate the right of suffrage and to determine the class of inhabitants who may vote. Each state may define the right in its own construction or empower its legislature to do so. So also the legislative assembly of a territory has authority to regulate the exercise of the right of suffrage in such territory subject to the restrictions and limitations imposed by the federal constitution and the acts of Congress. All statutes tending to limit the citizen in his exercise of the right of suffrage should be liberally constructed in his favor. The privilege of voting, when once conferred, is not to be taken away or restricted except by clear command of law."

"The legislature has the power to enact reasonable provisions for the purpose of requiring persons offering to vote to show that they have the necessary qualifications, as by requiring registration. In some states the constitution expressly requires or authorizes the legislature to provide for the registration of voters as a condition precedent to voting, or contains other provisions from which the power may be implied. Also the organic acts of some territories expressly refer to registration as a qualification. A registration law may properly require electors to register at the place in which they reside; prescribe what shall be presumptive evidence of the disqualification of one offering to register; require an affidavit or oath as to qualification as a condition precedent to the right to register; require persons coming into the state to reside to make a declaration of their intention of becoming citizens and residents of the state before they can claim the right to be registered as voters; and require the production of a certificate of registration, or in case of its loss, a duplicate certificate thereof. But to be

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valid, a registry law must be reasonable, not impairing the right of suffrage or depriving a person of it without fault or negligence on his part. The rule is sometimes stated to be that registration laws must be reasonable, uniform, and impartial, and calculated to facilitate and secure, rather than to subvert or impede, the exercise of the right to vote." 20 *Corpus Juris*, Pages 60, 61 and 64. See also 29 *Corpus Juris Secundum*, Page 23, etc.

The most detailed discussion of the elective franchise is contained in *Breedlove* v. *Suttles*, 183 Georgia, Page 189; 203 U. S., Page 277; 82 Law Edition, Page 252. Justice Beck in the opinion quotes with approval from Cooley on constitutional limitations, and says:

"We have said, that, though the sovereignty is in the people, as a practical fact it resides in those persons who by the constitution of the State are permitted to exercise the elective franchise. The whole subject of the regulation of elections, including the prescribing of qualifications for suffrage, is left by the national constitution to the several states, except as it is provided by that instrument that the electors for representatives in Congress shall have the qualifications requisite for electors of the most numerous branch of the State legislature, and as the fifteenth amendment, forbids denying to citizens the right to vote on account of race, color, or previous condition of servitude. Participation in the elective franchise is a privilege rather than a right, and it is granted or denied on grounds of general policy."

"The provision for a registry deprives no one of his right but is only a reasonable regulation under which the right may be exercised. Such regulations must always have been within the power of the legislature, unless forbidden. Many resting upon the same principle are always prescribed, and have never been supposed to be open to objection."

"The legislature has the right to authorize and to require the registration of voters in a town or city, but the regulations prescribed must be reasonable and impartial and calculated to facilitate and secure the constitutional right of suffrage, and not to subvert nor injuriously, unreasonably or unnecessarily restrain, impair or impede the right." *Stephens* v. *Mayor and Council of Albany*, 84 Georgia, page 630 (636).

"Registration adds no qualification to voters, but only serves to identify them as persons qualified to vote." 88 Georgia, page 699, Headnote 3.

"Our registration laws do not deal with the qualification of voters. They can add nothing to such qualifications. They can take nothing therefrom. Registration adds no new qualification. It serves only to identify the persons who are qualified to vote." *Jones* v. *Darby*, 174 Georgia, page 71 (76).

In the year 1880 the registration law applicable to the City of Savannah was attacked on the grounds that the registration law added qualification not provided for in the Constitution of our State, and that the registration law was therefore invalid. The case is reported as *McMahon* v. *Mayor, etc., of Savannah*, 66 Georgia, page 217. In an opinion written by Justice Speer, from which there were no dissents, the Court said:

"New requirements of registration has been held not to be the addition of a qualification to an elector. It is but a means of carrying out the registration law, and is strictly in unison with its purposes which are to provide for the proper designation and ascertainment of a voter in municipal elections. While it may not be, and is not in the province of the legislature to prescribe a new qualification for an elector, it certainly is within the scope of their authority to regulate the mode and manner of conducting elections

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for the purpose of securing a fair and legal result at the ballot-box."

The above case was cited with approval in *Ellis* v. *McMillan*, 186 Georgia, page 259.

In arguing the above proposition, we have not overlooked the restraint imposed upon the States by the Constitution of the United States, and in particularly the Fourteenth Amendment and Fifteenth Amendments, which amendments are the basis of the appeal by the appellant. We recognize that the United States prohibits discrimination of any State on account of race, color or previous condition of servitude, and that no State shall make any law which shall abridge the privileges or immunities of citizens of the United States. This has been well settled in *United States* v. *William J. Cruikshank*, 2 Otto, page 542, 23 Law Ed. 588, which passed upon the effect of the Fourteenth Amendment on the right of suffrage; and the case of *United States* v. *Hiram Reese*, 2 Otto, page 214, 23 Law. Ed., page 563.

"The right to vote in the States comes from the States, but the right of exemption from the prohibited discrimination comes from the United States. The first has not been granted or secured by the Constitution of the United States, but the last has been." *McPherson, et al.*, v. *Blacker*, 146 U. S. 1; 13 S. Ct., page 3.

The assignments of error in the case under consideration have much to be wished for when examined in the light of whether a federal question has been presented. It is our contention that the right to vote is a State question, and that the State of Georgia has established the law in reference thereto, and that no federal question is presented, even though an attempt has been made to do so. The demurrer of the appellant charges that the act in question "abridges the privileges and immunities of the citizens of the United States, and deprives persons of their liberty without due process of law, since the right to vote is the very foundation

of a democratic form of government, and to set up a Board which has power to discriminate and censor the right of citizens to vote, who are the creators of the government, and is therefore void." Nowhere in the assignments of error nor in the previous pleadings of this case has the appellant so much as alleged HOW the Board can discriminate and censor the right of citizens under the act.

The other ground of the appellant's demurrer charges that the act in question "abridges the right of the citizens to vote on account of race and color, and leaves to three men the unlimited and arbitrary power to declare them ineligible to vote." Neither in the assignments of error nor in the pleadings does the appellant allege WHO is discriminated against, the form of discrimination, or the class of persons who are discriminated against; but to the contrary the assignments of error allege that the act "was intended to discriminate against all persons, white and black", which is a physical impossibility.

"The word *discriminate* may be defined as treating one differently from another." *Wimberly* v. *Georgia Southern and F. Railway Company*, 5 Georgia Appeals, 263.

"Allegations that a person indicated in State Court was being deprived of equal civil rights because he could not obtain justice in any State Court because of prejudicial and local influence, would not constitute discrimination affecting civil rights so as to warrant removal." *Snypp* v. *State of Ohio*, 70 F. (2d) 535; 12 Words and Phrases, page 604.

MOTION

In view of the above propositions of law and undisputed facts, the appellees move the court to dismiss the writ of error and the appeal on the grounds that the Supreme Court of the United States does not have jurisdiction, for the following reasons:

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(1) That no Federal question is involved in determining whether once a citizen of the United States has qualified as a registered voter within the State of Georgia, the law making power of said State may not require a re-registration of such registered voter for the right to vote is not a property right, this being a State question and the State of Georgia having passed thereon.

(2) No substantial federal question is presented in determining whether the Fourteenth Amendment of the United States Constitution confers on a citizen of the United States the right to vote, for the law has been established that it does not.

(3) No substantial federal question is presented in determining whether the Fifteenth Amendment to the United States Constitution confers on a citizen of the United States the right to vote, for the law has been established that it does not.

(4) No federal question is involved because there is no assertion that the appellant or any one else, who is qualified under the Constitution of 1945 of Georgia to vote, has sought to register and been unlawfully denied the right to register; nor does the appellant point out how and in what manner the act empowers the Board of Registrars to discriminate against the appellant or against any other citizen in violation of the Fourteenth Amendment to the Federal Constitution.

(5) No federal question is involved because the appellant does not assert what class of citizens have been discriminated against on account of race, color, or previous condition of servitude for it is a physical and legal impossibility to discriminate "against all persons" contrary to the Fifteenth Amendment of the Federal Constitution.

The United States Supreme Court may not undertake to

review a decision of a State Court unless it appears affirmatively from the record not only that the federal question involved was presented to the highest state court having jurisdiction, but that its decision of the federal question was necessary to the determination of the cause. *Honeyman* v. *Hannan*, 300 U. S. 14; 57 S. Ct. Rep., page 350.

"It is essential to a proper presentation of points relied on for reversal that the statute and rules of Court requiring and governing the forms of assignments of errors be complied with. Every appeal must be accompanied with an assignment of errors which shall 'set out separately and particularly each error asserted.' R. S. section 997, 28 U. S. C. section 862 (28 U. S. C. A. section 862); Supreme Court Rule 9 (28 U. S. C. A. section 354). The purpose is to enable the court, as well as opposing counsel, readily to perceive what points are relied on. The substitution of vague and general statement for the prescribed particularity sets the rule at naught. Phillips, etc., Const. Co. v. Seymour, 91 U. S. 646, 648, 23 L. Ed. 341; Briscoe v. Dist. of Columbia, 221 U. S. 547, 549-550, 31 S. Ct. 679, 55 L. Ed. 848. And, as the rule makes for convenience and certainty in the consideration of cases, the court may, and generally it will, disregard a specification that is so uncertain or otherwise deficient as not substantially to comply with the rule, even if the opposing party raises no question and treats it as adequate." *Seaboard Air Line Ry. Co.* v. *Watson*, 287 U. S. 86; 53 S. Ct. Rep. 32.

"We are thus asked to pass on the constitutionality of a possible application of the state statute in advance of its application to appellant, and of its authoritative construction by the state courts. Lacking such construction, without which no constitutional question can arise, the issue is not an appropriate one for adjudication by the declaratory judgment procedure. This Court is without power to give

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advisory opinions. It will not decide constitutional issues which are hypothetical, or in advance of the necessity for deciding them, or without reference to the manner in which the statute, whose constitutional validity is drawn in question, is to be applied. Alabama State Federation of Labor vs. McAdory, 325 U. S. 450, 65 S. Ct. 1384, at pages 1389, 1390." *Asbury Hospital* v. *Cass County*, 326 U. S. 207, 66 S. Ct. 61.

See also *Abrams, et al.* v. *Van Schaick*, 293 U. S. 188, 55 S. Ct. 135.

"The jurisdiction of this Court to review the proceedings of the State Courts, as we have had frequent occasion to declare, is not that of a general review court in error, but is limited to the specific instances of denials of federal rights, whether those pending to the constitutionality of federal or state statutes or to certain rights, immunities and privileges of federal origin specially set up in the State court and denied by the rulings and judgment of that Court." *Waters-Pierce Oil Co.* v. *State of Texas*, 212 U. S. 86, 29 S. Ct. 220.

Frivolous appeals without substance may authorize the Court to dismiss the writ of error. *Raw* v. *State of Texas*, 278 U. S. 191, 49 S. Ct. 160.

Respectfully submitted,

J. Walker Harper,
Pro Se.